STATE OF MICHIGAN

COURT OF APPEALS

John Lang,

Appellant.

v.

Kari Lang,

Appellee

COA Case No: 347110

Circuit Court Case No:

18-102826-DM

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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Kari Lang
In Pro Per

NOW COMES Appellant by and through counsel and hereby submits the following brief in support of his appeal.

Dated: 9/2/19

FOR THE APPELLANT:

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STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court err in awarding spousal support at $2910.00 per month excessive and without giving due consideration to appellee's true need, with the input of a prognosticator, and failed to consider assets awarded to appellee in deciding spousal Support?

Trial Court Answer: No

Appellee Answer: No

Appellant Answer: Yes

2. Did the trial court err in awarding appellee eighty percent (80%) of her attorney fees without considering fairness and equity which involved the implied purpose of punishing Appellant for exercising his right to a trial?

Trial Court Answer: No

Appellee Answer: No

Appellant Answer: Yes

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NOW COMES Appellant by and through counsel and for the brief in support of appeal hereby states the following:

STATEMENT OF JURISDICTION

Pursuant to MCR 7.212(4)(a)(1) this court has jurisdiction as follows. This appeal is taken as a matter of right. The claim of appeal was filed on January 4, 2019 and within the twenty-one day period as required by MCR 7.204(A)(1)(a); the judgment of divorce was entered on December 14, 2018. The judgment is a final ordered as defined by MCR 7.202(6) as it is the "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties". MCL 600.308(a)(1);

The court of described in subsections (2) and (3). A final judgment or final order described in this subsection is appealable as a matter of right. Appeals has jurisdiction on appeals from all final judgments and final orders from the circuit court, court of claims, and probate court, as those terms are defined by law and supreme court rule, except final judgments and final orders

Accordingly this court has jurisdiction to hear this appeal.

The order appealed from is for issues pertaining to an award of spousal support and attorney fees and not the issue of property division. MCR 7.212(4)(b).

STATEMENT OF FACTS

After a trial held on November 6, 2018 in Third Judicial Circuit before the honorable Charlene Elder this appeal followed. Appellant is the Defendant in the lower court in this divorce case with no minor children. The parties were married for twenty-nine years(Tr. pg 104, L. 20). The parties owned a home in Canton, Michigan of which the value has been a matter of dispute throughout this entire case and valued between $275,000.00 (Tr. pg. 37, L. 11) and $295,000 (Tr. pg 86, L.4-6). The parties had numerous assets to divide except for Appellee's DTE stock valued at $27,000.00 claimed as separate property (Tr. pg. 43, L. 9-12). The assets that were divided in half were Appellant's Mass Mutual account which is roughly $190,000.00 and half of his Ameritrade account which is roughly $574,000.00 and additional $1700.00 representing half of the fidelity account. (Tr. pg. 100, L 22-25, pg 101 L. 1-2). Appellant was ordered to pay eight percent of Appellee's attorney fees (Tr. pg. 208, L. 15-21) which total over $10000.00 (Tr. pg. 08, L. 8-9).Appellant as ordered to pay spousal support of $2910.00 per month.(Tr. pg. 106, L. 20-21). Appellant believes that the use of a "prognosticator" was material to the court's decision. (Tr. pg. 101, L.19-20), (Tr. pg. 102, L. 13-18), and (Tr. pg. 102, L. 4-6). However the court did discuss, although not analyze in detail, various factors as to why such an amount should be awarded. The amount of spousal support and the award of attorney fees is in dispute between the parties. Appellant asserts that the spousal support should be $1231.00 (Tr. pg. 100, L. 9-10). These issues were preserved for appeal as Appellant asserted a different

amount and attorney fees were asserted at zero as Appellee was being awarded a substantial amount of assets. (Tr. pg 101, L. 17-18).

STANDARD OF REVIEW

Although findings of fact in divorce cases are reviewed under a clearly erroneous standard, dispositional rulings such as whether and how much alimony to award are reviewed de novo. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992); see also *Sands v Sands*, 442 Mich 30; 497 NW2d 493 (1993). "If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts."*Sparks, supra* at 151-152.

The trial court has discretion to award spousal support. MCL. 552.23(1). Also see MCR. 2.613(C). The trial court's findings of fact related to an award of spousal support for clear error. *Moore v. Moore,* 242 Mich.App. 652, 654, 619 N.W.2d 723 (2000). " A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made." Id. at 654-655, 619 N.W.2d 723. A reviewing court may determine a finding is clearly erroneous only when, on the basis of all the evidence, it is left with a definite and firm conviction that a mistake has been made. *Ewald v. Ewald*, 292 Mich.App. 706, 810 N.W.2d 396, (2011).

The award of attorney fees should be reviewed for an abuse of discretion. *Stackhouse v Stackhouse,* 193 Mich App 437, 445; 484 NW2d 723 (1992).

ARGUMENT 1.

THE TRIAL COURT ERRED IN AWARDING SPOUSAL SUPPORT BY ORDERING AN EXCESSIVE MONTHLY AMOUNT WITHOUT GIVING DUE CONSIDERATION TO APPELLEE'S TRUE NEED INCLUDING AMOUNT OF PROPERTY AWARDED AND ALSO

THAT THE AWARD WOULD RENDER APPELLANT UNDULY FINANCIALLY BURDENED.

(1) Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case. MCL 552.23.

Appellant does not argue that there should be no award for spousal support in a twenty-nine year marriage. The amount awarded however is excessive. Spousal Support is to be based on what is just and reasonable under the circumstances. *Ackerman v Ackerman*, 163 Mich.App. 796, 803; 414 N.W.2d. 919 (1987). Another definition is the primary purpose of spousal support is to " balance the incomes and needs of the parties in a way that will not impoverish either party" on the basis of what is " just and reasonable under the circumstances of the case." *Myland v. Myland, 290 Mich.App.* 691, 804 N.W.2d 124, *(2010).* Also see *Moore v Moore,* 242 Mich.App. 652, 654; 619 N.W.2d 723 (2000). "The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that will not impoverish either party," and spousal support "is to be based on what is just and reasonable under the circumstances of the case."

In the case at bar the spousal support is anything but just and reasonable. First Appellee is treated as a case of disability but the record does not support that. The trial court states that:

Appellee's ability appears to be somewhat diminished at this time. " She's [sic] has not worked throughout the entire marriage and she has a high school degree. And her back issues to not make her very marketable" (Tr. pg. 104 L. 24-25, pg. 105 L. 1-3). The condition the court refers to is as follows (Tr. pg. 20 L. 10-23):

Q: Can you explain to the judge what your chronic neck and back issues are?

A: Well the way it was explained to me it's like a narrowing of the spine in my upper and lower. And it just gets inflamed easily which causes me pain I take –I do take over the

counter medication for it which kinda helps a little bit [sic] but doesn't take it all the way. It's always there. It's never gone.

Q: What's the—what's the over the counter medication you take?

A: It's Excedrin.

A disc fusion may be in the future (Tr. pg. 21, L. 21). Appellee says "I can't do anything for a length of time....Sitting any length of time" (Tr. pg. 22, L.18-20). However Appellee did testify to going to cedar point and to movies (Tr. pg. 24, L. 24-25, pg. 25 L.1-2). If she can go to cedar point she could conceivably be a uber driver or bus driver. Or other jobs. There is nothing in the record suggesting lifting restrictions and there is nothing in the record suggesting any limitations on work by a physician.

Appellee's home and car are paid for (Tr. pg. 26, L. 14-17). She has no debt (Tr. pg. 26, 25, 27,1). However the trial court awards spousal support in the amount of $2910.00 per month (Tr. pg. 106, L. 21) and eighty percent of attorney fees to Appellee. (Tr. pg. 108, L. 19). The court states that the amount awarded is pretty much going to be equal (Tr. pg. 105, L. 5-7). This is a factor wherein the relevance is not the percentage but the amount. As argued previously the dollar amounts awarded is a large sum and adequate for Appellee to be sustained.

The trial court is correct on the ages of the parties and that Appellant can pay support. And appellant is not seeking to vitiate support. (Tr. pg. 105, L. 8-13). Interestingly the court states it "recognizes that plaintiff's back limits her abilities" (Tr. pg. 105, L. 24-25). That issue is not in dispute that she may have limitations but that does not mean she can do no work. An insufficient record and fact finding as to her ability to work requires a reversal. The court makes numerous references to Appellee not being able to work at all but with just the testimony of Appellee.

The trial court errs in relying on formulas that generate a monthly amount of spousal support much like child support. The "prognosticator" was used:

> So therefore, this court ran the prognosticator with Defendant's—Defendant's income at $90,000.00 and I know that's lower than what you initially asked for. Due to this fluctuation in the bonuses and then I ran the Plaintiff at zero because there's hardly any testimony (inaudible) of income and the court is uncertain that she has the ability to work at this time or earn. (Tr. pg. 106, L. 13-19).

The "application and use of an arbitrary formula to calculate an award of spousal support was fair and equitable under the circumstances of this case. We hold that MCL 552.23 prohibits the use of rigid and arbitrary formulas that fail to account for the parties' unique circumstances and relative positions and reaffirm the mandate that a trial court awarding spousal support must consider the relevant factors. *Myland v. Myland* 290 Mich App at 691; 804 N105W2d (2010).

Although the court did analyze some of the appropriate factors it seems the court was more persuaded by the prognosticator. The use of a prognosticator for spousal support is insufficient to make a determination; the software designer is not a judge.

But at that very least the numbers should have been run at minimum wage imputed to Appellee.

In applying the factors it is abuse of discretion to award spousal support at $2910.00 per month. That is more than half of Appellant's usual monthly income without bonuses. "The main objective of [spousal support] is to balance the incomes and needs of the parties in a way that will not impoverish either party," *Moore v Moore*, 242 Mich.App. 652, 654; 619 N.W.2d 723 (2000) "is to be based on what is just and reasonable under the circumstances of the case." .The amount is unconscionable and the decision should be reversed.

ARGUMENT II

THE TRIAL COURT ERRED IN AWARDING APPELLEE EIGHTY PERCENT OF ATTORNEY FEES INCURRED IN THE DIVORCE ACTION, FOR THE REASON OF PUNISHING APPELLANT FOR PROCEEDING TO TRIAL.

Michigan follows the so-called "American rule," under which attorney fees are not recoverable unless specifically authorized by statute, court rule, or a common-law exception. *Popma v Auto Club Ins Ass'n,* 446 Mich 460, 474; 521 NW2d 831 (1994). An exception in domestic relations matters is in the following court rule:

A party may request an award of attorney fees in a domestic relations action pursuant to MCR. 3.206(D) which reads as follows:

> Attorney Fees and Expenses.
> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

In domestic relations cases attorney fees are not awarded according to the above statute. Rather, attorney fees are not awarded only as necessary to enable a party to carry on or defend the litigation. *Arnholt v. Arnholt,* 129 Mich.App. 810, 818, 343 N.W.2d 214 (1983). Based on property awarded Appellee can pay her attorney fees. First she was awarded $27,000.00 in DTE stock as her sole and separate property. Uncontroverted testimony establishes the amount stated of the DTE stock (T. pg. 43, L.10-13). And the uncontroverted recitation of Appellant's counsel regarding Appellee's award establishes she can pay the fees from property awarded. She is awarded half net proceeds of the marital home (Tr. pg. 100, L.12). The marital home is owned

free and clear (Tr. pg 27, L.18-19). She was awarded half of the parties bank accounts roughly $68,000.000 (Tr. page. L.100, 24) and half of Appellant's Mass Mutual account which is roughly $190,000.00 (tr. pg. 100, L.25). Also half of the Ameritrade account which is roughly $574,000.00 and $1700.00 representing half of the fidelity account.

Nothing could be more evident in the transcript other than Appellant wanted reconciliation and did not want the divorce. (Tr. pg 74, L15-25, pg. 76, L. 1-23).Such a position does not establish Appellee is unable to bear the expense of the action or that Appellant failed to comply with a court order. Indeed Appellant has a right to a trial and due process. "Both the federal and state constitutions guarantee the right to due process of law. U.S. Const., Am. XIV; Const. 1963, art. 1, § 2. Due process requires fundamental fairness and applies to any adjudication of important rights." *Molloy v. Molloy*, 637 N.W.2d 803, 247 Mich.App. 348 (Mich.App. 2001). The trial court erroneously awarded attorney fees because it believed appellant to be the reason the trial went forward and not settled. And also because the trial court found Appellant responsible for Appellee having to file a motion for the sale of the home. However the record shows that Appellant had good reason as the square footage on the listing was wrong (Tr. pg. 65, L. 19 Tr. pg. 66 1-3. and pg. 66 L. 24-25, Pg. 67L. 2-6). Appellant rejected the offers and so protected himself, and Appellee for that matter, from a fraud accusation later on.

The trial court states that in awarding the attorney fees it considered that "sale of the home was court ordered". (Tr. pg. 108, L.2) In fact there is no disobedience to any particular court order. At most Appellant's conduct was cause for a motion to be filed. Without doubt this court is aware that motions for the sale of the marital home are frequently heard by the trial

court. Also the court awarded attorney fees on the basis that Appellant "Also failing to negotiate a settlement or except [sic] any agreement" (Pg. 108, L.6-7) and

"because you just wanted reconciliation that as all you were about to hear and nothing more. The court process was going forward wither way and I'm sure your attorney made you aware of that. That being said the courts [sic] going to ward the Plaintiff 80% of her attorney fees that have—that have been accrued in this matter so far." (Tr. pg.108 L.10-17).

A party's conduct is not grounds for attorney fees pursuant to MCR 3.206(D) or MCR 3.206(C) as cited by the court. It appears the court is making the award of attorney fees as a sanction for what the court sees as wrongful conduct. This type of sanction is not authorized by MCR 3.206(D). MCR 3.206(D) limits the award of attorney fees enumerated therein. This court must also determine whether a trial court may disregard *MCR 3.206(C)(2)(a)* when considering a request for attorney fees based on need and merely rely on whether a party engaged in either egregious conduct or wasteful litigation. This court has stated when a trial court fails to apply the proper needs-based analysis and instead awards attorney fees due to wasteful litigation or egregious conduct the case should be reversed and remanded. *Myland v. Myland*, 290 Mich.App. 691, 804 N.W.2d 124, (2010). Appellant' conduct was not egregious or wasteful but that is beside the point.

Without finding those facts and applying them to the court rule the decision must be reversed. However an appellate court will not reverse a decision to award fees absent an abuse of discretion. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). It is a very high standard for Appellant to reach. An abuse of discretion is explained as follows:

[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.... An abuse of discretion occurs ... when the trial court chooses an outcome falling outside this principled range of outcomes. "*Shulick v. Richards*, 273 Mich.App. 320, 729 N.W.2d 533, (2006).

One potential adverse authority must be disclosed to this court as follows "a party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees. *Myland v. Myland*, 290 Mich.App. 691, 804 N.W.2d 124, (2010). This was following the so-called Stallworth rule. "Because plaintiff's yearly income is less than the amount she owed her attorney, she sufficiently demonstrated her inability to pay her attorney fees." *Stallworth v. Stallworth*, 275 Mich.App. 282, 738 N.W.2d 264 (2007).

This so called " Stallworth rule" is not a bright-line rule. However "This Court has clarified that its explanation in Stallworth should not be construed as a bright-line rule that must be strictly enforced. *Safdar v. Aziz*, 344030.

The decision must be reversed as it exceeds judicial authority granted thereto by MCR 3.206(D). The order for attorney fees does fall outside the "principled range of outcomes" of applying the said court rule.

RELIEF REQUESTED

WHEREFORE Appellant respectfully requests that this honorable court reverse the trial court and not award attorney fees and award spousal support in the amount of $1231.00 as requested at trial.

Dated: 9/2/19

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I hereby certify that I served a copy of appellant's brief by regular first class mail by depositing said documents in an envelope, postage prepaid thereon, and depositing said envelope in a mail receptacle in Southeast Michigan on 9/2/19. The address for service is:

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Dated: 9/2/19

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